United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2003

To be argued by
RALPH L. McMURRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA ex rel. EZEKIAL CONWAY,

Petitioner-Appellant,

-against-

LEON VINCENT, Superintendent, Green Haven Correctional Facility,

Respondent-Appellee.

----------X

B
P/S

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-4178

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH L. McMURRY
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA ex rel. EZEKIAL CONWAY,

Petitioner-Appellant,

-against- 76-2003

LEON VINCENT, Superintendent, Green Haven Correctional Facility,

Respondent-Appellee.

----------X

BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant (petitioner) appeals from a decision dated November 17, 1975 of the United States District Court of the Eastern District of New York, Bramwell, J., denying petitioner's application for a writ of habeas corpus. A certificate of probable cause was issued by Bramwell, J., on December 1, 1975.

Question Presented

Whether the "stop and frisk" of petitioner, which produced a loaded gun, was lawful?

Statement of Facts

A. Prior Proceedings

Petitioner was convicted of attempted possession of a weapon by plea of guilty in the Nassau County Court on July 19, 1974. Petitioner was subsequently sentenced to a term of eighteen months to three years in state prison. The Appellate Division affirmed petitioner's conviction without opinion on April 1, 1975 (47 A D 2d 1002). Leave to appeal to the State Court of Appeals was denied May 15, 1975.

Petitioner then sought a writ of habeas corpus in federal court and obtained the adverse decision which he now appeals.*

* The right to maintain the federal habeas corpus proceeding despite the plea of guilty results from the holding by this Cicuit upheld by a closely divided court in Lefkowitz v. Newsome, ____U.S.____, 95 S. Ct. 886 (1975) that despite such plea, the proceeding may be entertained, a result which we have consistently maintained as contrary to the basis of federal habeas corpus.

B. Facts

Prior to petitioner's plea of guilty, a motion to suppress the loaded gun found in his possession was made. The grounds of the motion was that the "stop and frisk" of petitioner that produced the loaded gun was an invasion of petitioner's Fourth Amendment right to be protected against unreasonable searches and seizures. The motion was denied by the Nassau County Court. Petitioner's Appendices A1-A3. The only person to testify on the motion was one Officer John Hill. The facts as related by this witness are as follows.

On February 18, 1974, three Nassau County Police Officers were making checks of licensed premises for violations of the Alcoholic Beverage Law. At approximately 8 p.m., one of the three policemen, Officer John Hill, was seated in a patrol car while his two companions were investigating a tavern for possible ABC violations. At this time Hill received a radio transmission stating that a robbery had occurred at a Freeport pharmacy. The suspect was described as "male black, approximately six-foot tall, wearing a three quarters length brown or tannish-colored coat" (4-5).* The method of escape was unknown, but the perpetrator had last been seen walking in a particular direction. A "black-handled" gun had been used in the robbery (5).

* Numbers in parentheses refer to page numbers of hearing minutes on motion to suppress.

Only one hour later, Officer Hill and one of his colleagues entered a bar, the "Corner Inn", approximately one-half mile from the scene of the robbery. Upon entering, Hill noticed a "male black, approximately six feet tall, with a three quarter length brown jacket coat standing by the side of the room" (6, 28). This description fit that of the robber given out only an hour earlier for a robbery one-half mile away.* Officer Hill then observed that the subject seemed quite nervous and Hill observed him for a while, approximately 3 or 4 minutes (7, 8). The subject "shuffled around quite a bit" (7), and his hands were in his upper coat pockets (29). Hill had noticed the subject immediately upon entering the bar, even though there were less than twenty-five people in the bar, "mostly black" (28). Hill saw no one else acting nervously in the bar (34).

The subject watched the officers closely, and the officers passed him as they approached the rear of the room during the premises check. At this point the subject turned and left hurriedly (7). Officer Hill quickly followed the subject out of the bar, noting that the subject was "walking at a quite brisk pace" (10).

* Contrary to petitioner's suggestion (Br. 12), there is no evidence in the record that anyone else in the bar or anywhere else fit petitioner's description.

Officer Hill called upon the subject to stop, and the subject stopped. Hill asked the subject his name, residence, his whereabouts shortly before, and how long he had been in the bar. The subject gave his name, address and said he had been in the bar for "just a short while" with no one. He said that previously he had been with friends, but Officer Hill became more suspicious when it turned out petitioner had no friends in the area. The subject had no identification (10-12).

During the conversation the subject (now petitioner Conway herein) had his hands in his uppercoat pockets, and appeared to shuffling about and nervous (11). Hill noticed a bulge in Conway's lower right pocket. As Hill attempted to pat it, Conway stepped back out of reach and asked Hill if he had a search warrant. Conway attempted to push and ward Hill off, and as he did so Conway made a movement with his right hand towards his left side (13-15). That hand went into the area of his pocket (16), but Hill testified that he didn't know for certain where Conway was going when Conway reached for his left side (18). At this point Conway was grabbed by Officer Hill and a colleague and placed against the wall and frisked from ankles up (17-18). Upon reaching the lower chest area, Hill felt a hard object which he believed to be a gun. Hill retrieved the object, which was a loaded .32 revolver (20-21).

ARGUMENT

THE STOP AND FRISK OF PETITIONER WAS LAWFUL

Petitioner argues that the loaded weapon taken from his person as a result of Officer Hill's "stop and frisk" was an unwarranted Fourth Amendment intrusion. This argument is totally devoid of merit.

A. The "Frisk"

The taking of the loaded gun from petitioner was nothing more than the result of an unquestionably legitimate stop and frisk performed well within the parameters of the established principles of Terry v. Ohio, 392 U.S. 1 (1968).

In Terry, the Court held that:

> "Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to

> dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken."

The situation in the case at bar is a classical Terry situation. One hour after an armed robbery one-half mile away, a police officer observed in a bar a man fitting the description of the robber and behaving nervously and shuffling with hands in his pockets. Almost as soon as the officers arrived the man exited the bar and walked quickly away.* Upon being stopped, the man answered a few routine queries, although not entirely satisfactorily, and continued to behave nervously and to shuffle. As the officer attempted to pat him down the man made a quick movement with one of his hands for his pocket.

* Petitioner attributes this "brisk" pace to the "cold" weather-in the "thirties" Br. 8 (32); there is no evidence in the record that anyone else was walking at a "brisk" pace; moreover petitioner's assumption that everyone walks at the same pace at the same temperature is completely without foundation.

At this point Officer Hill was perfectly justified in frisking petitioner for a weapon. Hill acted on his own observations and knowledge, not on "inarticulate hunches." Terry, supra at 22. The issue is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry, supra at 27. Surely it was "reasonably prudent" for Officer Hill to have believed petitioner may have been armed and to take the action that he did, in view of the fact that an armed robbery had recently been committed nearby by a man of petitioner's description and in view of the fact that petitioner behaved suspiciously and made a quick move with his hand. Not to have frisked petitioner would have been an abdication of Hill's duty to the citizenry and indeed may have been suicidal as far as the officer himself was concerned.

If anything, the case at bar is more of a Terry case than Terry itself. The drama in Terry began to unfold with the officer's simple feeling that the man "didn't look right." (Terry, supra at 5). Here, there was a consummated armed robbery; a description of the robber and a person answering the description of the robber behaving suspiciously near the scene of crime only an hour as so after the crime.

Petitioner appears to concede that Officer Hill was entitled to conduct a "stop and frisk" limited to the torso area. Br. 6. Petitioner's argument rather is simply that the "stop and frisk" unjustifiably went beyond the torso area to include an exploratory frisk from ankles up. This argument is totally devoid of merit. There was ample basis to frisk petitioner even in the absence of any quick movement by petitioner's hand to his left side when Officer Hill attempted to pat down the bulge. Further, the "torso area"* admitted by petitioner as legitimately subject to a frisk is certainly broad enough to include the "lower chest area" where petitioner admits the gun was found.

Petitioner's argument also assumes that Officer Hill could not reasonably conclude that petitioner concealed weapons in places other than petitioner's torso area. Such an assumption is clearly unwarranted. It would be reasonable for example, for Officer Hill not to exclude the possibility that petitioner carried several weapons on his person or that his hand movement was a trick feint. Indeed, Officer Hill testified that he didn't know where Conway "was going" when Conway made his quick hand movement" (18).

* Precisely what petitioner means by the "torso area" is unclear.

United States v. Del Toro, 464 F. 2d 520 (2d Cir. 1972) (Br. 6) cited by petitioner, in fact fully supports the State's position in this case. In Del Toro, the Court sustained a right to frisk in circumstances where the level of suspicion was far lower than that in the case at bar. In Del Toro, the frisk was justified simply because the person frisked was the "companion" of a "known narcotics dealer", and because narcotics dealers "often" employ body guards. The Court merely held that a $10 bill folded to a size of 2" x 3/4" felt in a suit could not reasonably have aroused suspicion of a weapon, and therefore could not be seized and introduced into evidence. The only item "felt" here, however, was a hard object believed by Officer Hill to be a gun and which was in fact a gun.

As the Supreme Court said in Terry, each case must turn on its own facts. Terry, supra at 30. In numerous cases similar to the case at bar, investigatory stops and frisks have been upheld.

In United States ex rel. Moya v. Zelker, 329 F. Supp. 120 (S.D.N.Y. 1971), police officers found the petitioner several blocks away from the robbery scene. The petitioner was walking hurriedly, breathing hard, appeared sweaty, and was looking to the wall. A pat down and its eventual lead to incriminating evidence were upheld. The

critical element in Moya was the suspicious behavior of the suspect; in the case at bar petitioner's suspicious behavior is only one element of the total circumstances; the description of the perpetrator is another element. Moya was affirmed by the Second Circuit without opinion (456 F. 2d 687 [1972]). See also Glick v. Erickson, 488 F. 2d 182 (8th Cir. 1973); United States v. Edwards, 469 F. 2d 1362 (5th Cir. 1972); Carpenter v. Sigler, 419 F. 2d 169 (8th Cir. 1969); Sawyer v. Craven, 325 F. Supp. 526 (C.D. Cal. 1971).

B. The "Stop"

In Point Two of his brief petitioner argues that the "initial stop" of petitioner was not justified, apparently because of an alleged "delay"* in the frisk from the time the police first observed him, a "delay" resulting in part from police questioning. Br. 11. Petitioner also doubts the police relied on the radio report transmitting news of an armed robbery, or they could have taken "more immediate" measures to protect themselves. Br. 11. Petitioner argues from this that a lack of true suspicion can be inferred from this "delay", and accordingly concludes that even the "stop" portion of the "stop and frisk" can not be justified.

* This time elapsed during this "delay" is not clear from the record, but it appears to have been only a matter of minutes (8).

At the outset, petitioner errs in attempting in this case to separate the "stop" from the "frisk". The Supreme Court has made it clear that investigatory stops and protective frisks are together a unitary concept which views police encounters with citizens as a single transaction. Terry v. Ohio, 392 U.S. 1, 23, 24 (1968); Adams v. Williams, 407 U.S. 143, 146 (1972). The facts which justified the frisk in this case include the same facts which justified the stop that necessarily preceded the frisk.

Petitioner is in any event incorrect in assuming that "delay" here is evidence of a lack of true suspicion. Suspicion necessarily accumulates over a period of time. In this case the suspicion accumulated over a period of only a few minutes - similar to the period of time in which Officer MacFadden made his observations in Terry. It was petitioner's sudden departure from the bar on the approach of policemen which crystallized Officer Hill's accumulating observations and suspicions into full grown suspicion and caused him to pursue the matter further.

Petitioner's conjecture as to whether Officer Hill was relying on the radio report of an armed robbery is simply irrelevant; the fact is that the radio report was known to

Officer Hill and was, objectively speaking, part of the total information available to the police prior to the stop and frisk. The test in these cases is objective, not subjective. United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); in accord, United States v. Canieso, 470 F. 2d 1224 (2d Cir. 1971).

Whitely v. Warden, 401 U.S. 560 (1971), cited by petitioner, is completely irrelevant. In that case the sufficiency and basis a particular radio bulletin to justify an arrest based on probable cause was at issue. In this case, the radio bulletin was only one part of a pool of information justifying a limited stop and frisk based on reasonable suspicion. The standards of probable cause for an arrest and reasonable suspicion for a limited stop and frisk are completely different.

Petitioner also faults Officer Hill for asking petitioner several questions prior to the frisk, and argues that this constitutes a delay in frisking from which the absence of true suspicion could be inferred. This argument is without merit. Again petitioner seeks to argue on conjecture and inferences rather than facts. If this brief questioning proves anything, it proves only that Officer Hill was a prudent policeman who proceeded without undue haste and preferred to ask

first rather than later. This amounted to nothing more than a brief stop to maintain the status quo while obtaining more information, a procedure and policy of "intermediate response" specifically approved by the Supreme Court. Adams v. Williams, 407 U.S. 143, 145, 146 (1972).

CONCLUSION

THE JUDMGENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
February 9, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH L. McMURRY
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for respondent-appellee herein. On the 9th day of February , 1976 , she served the annexed upon the following named person :

LEGAL AID SOCIETY
OF NASSAU COUNTY
Criminal Division
400 County Seat Drive
Mineola, New York

Att: Matthew Muraskin, Esq.
Mrs. Martha Henley

Attorneys in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address within the State designated by them for that purpose.

Mary Ko

Sworn to before me this
9th day of February , 1976

Ralph McMurry

Assistant Attorney General
of the State of New York